STATE OF MICHIGAN
IN THE SUPREME COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, and SIERRA CLUB,

Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and DAN WYANT,

Appellants,

and

AK STEEL, INC.,

Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 326485

Wayne County Circuit Court No. 14-008887-AA

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Michigan Department of Environmental Quality (DEQ) seeks leave to appeal the Court of Appeals' order of September 21, 2016. That order denied DEQ's motion for reconsideration of an opinion by the Court of Appeals dated July 12, 2016. Copies of the order and opinion are attached as Exhibits 1 and 2.

The Supreme Court has jurisdiction over this application for leave to appeal pursuant to MCL 600.232 and MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Section 91(1) of the Administrative Procedures Act, MCL 24.291(1), states that the contested-case provisions of the Act apply to agency licensing actions that are preceded by notice and an opportunity for a hearing. The definition of a contested case and the Act's provisions for contested cases demonstrate that "hearing" in MCL 24.291(1) means an *evidentiary* hearing. Did the Court of Appeals err when it interpreted "hearing" to mean a *public* hearing?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

2. Did the Court of Appeals also err when it ruled that the contested-case provisions of the Administrative Procedures Act apply to an agency licensing decision where the parties challenging the decision do not have a right to a contested case?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

3. MCR 7.119 governs an appeal to circuit court from an agency licensing decision after a contested case. The Court of Appeals ruled that MCR 7.119 governed this appeal of a DEQ licensing decision where there was a public hearing on a draft permit but no contested case occurred. Did the Court of Appeals err when it ruled that MCR 7.119 governed the appeal of DEQ's licensing decision?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

STATUTES AND RULES INVOLVED

MCL 24.291(1)

> (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.

MCL 24.203(3), in relevant part

> (3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. . . .

MCR 7.119(A)

> (A) Scope. This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

MCR 7.123(A)

> (A) Scope. This rule governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

INTRODUCTION

This application seeks to correct a clear legal error. The Court of Appeals misinterpreted the Administrative Procedures Act by concluding that the contested-case provisions of the APA apply to agency licensing decisions whenever an agency holds any kind of public hearing on a proposed license. The Court of Appeals' opinion would greatly expand the number of agency licensing decisions for which parties have an opportunity for a contested case when, in fact, the law does not provide a right to a contested case.

Many statutes, including environmental statutes, provide for a public hearing on an agency's proposed licensing action. *See e.g.,* MCL 324.55011(3) (providing for public hearings on draft permits for major air pollution sources); MCL 324.30105(3) (providing for public hearings on draft permits affecting inland lakes and streams); MCL 324.30307(1) (providing for public hearings on draft permits for filling wetlands). The public hearings are meetings where an agency explains a proposed action and where the public is allowed to comment. Some of these statutes also expressly provide for a contested-case hearing for a person who is aggrieved by the action an agency takes after a public hearing has been held. *See e.g.,* MCL 324.30110(2) (providing that persons who are "aggrieved by any action or inaction" of DEQ may request a contested case); MCL 324.30319(2) (same).

The statute at issue in this case, Part 55 of the Natural Resources and Environmental Protection Act, MCL 324.5501 *et seq.*, provides for a public hearing on a draft permit for a major air pollution facility, but does not provide for a contested case for persons who, like the parties who appealed the air pollution

permit DEQ issued, want to challenge DEQ's permitting decision but do not own or operate the facility. MCL 324.5506(14). Thus, the APA's contested-case provisions did not apply to DEQ's permitting decision in this case.

The Court of Appeals, however, concluded that the APA's contested-case provisions applied, misinterpreting the word "hearing" in Section 91(1) of the APA, MCL 24.291(1), to mean a *public* hearing rather than an *evidentiary, contested-case* hearing. But Section 91(1)'s reference to a hearing—"When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply."—refers to the type of hearing available in a contested case, and a "contested case" is defined as "a proceeding . . . including licensing . . . in which [a party's rights are required to be made] by an agency after an opportunity for an *evidentiary* hearing[.]" MCL 24.203(3) (emphasis added). In addition, the APA's provisions for contested cases establish trial-like procedures in which parties examine witnesses and present documentary evidence before an administrative law judge. MCL 24.271-287. Further, MCL 24.241(4) expressly provides that a "public hearing . . . is not subject to the provisions governing a contested case." These provisions confirm that the "hearing" referenced in Section 91(1) is an evidentiary hearing, not a public hearing as the Court of Appeals held.

The Court of Appeals compounded its error by ruling that MCR 7.119 governs an appeal to circuit court from an agency decision when no contested case occurred, but the text of that rule confirms that it applies only when a contested case has occurred. As a result, the Court of Appeals determined that the parties challenging

DEQ's licensing decision in this case have 60 days to file their appeal under MCR 7.119(B). In fact, the court rule that applies when there is no contested case is MCR 7.123, under which the parties had 21 days to file their claim of appeal. MCR 7.123(B)(1).

The Court of Appeals' error will lead to claims that persons have a right to a contested case whenever an agency provides notice and an opportunity for a public hearing on a proposed licensing action, even when there is no right to a contested case provided by law. If uncorrected, the increase in evidentiary hearings will require state agencies to expend their limited resources on contested cases for which there is no statutory requirement. The Court of Appeals' mistake will also result in the circuit courts applying the wrong court rule to appeals from agency decisions where there was a public hearing but no contested case. This case therefore involves a legal principle of major significance to the state's jurisprudence under MCR 7.305(B)(2). In addition, the case is against a state agency and, because of its impact on both private parties and state agencies, involves an issue of significant public interest under MCR 7.305(B)(3).

DEQ asks this Court to grant leave and reverse the portion of the Court of Appeals' opinion of July 12, 2016, holding that the contested-case provisions of the Administrative Procedures Act apply to agency licensing actions that are preceded by notice and an opportunity for a public hearing. (Ex 2, pp 5-7.) Alternatively, DEQ asks this Court to peremptorily reverse that portion of the Court of Appeals' opinion and dismiss the case.

STATEMENT OF FACTS AND PROCEEDINGS

On May 12, 2014, DEQ issued a "permit to install" for a steel mill in Dearborn now owned by AK Steel Corporation. (Ex 2, p 2.) The permit authorizes the emission of air pollutants and revises emission limits contained in a previous permit. DEQ issued the permit under Michigan's air-pollution statute, Part 55 of the Natural Resources and Environmental Protection Act, MCL 324.5501 *et seq.* (NREPA) (*Id.* at pp 1-2.)

Fifty-nine days after DEQ issued the permit, the South Dearborn Environmental Improvement Association (SDEIA) and other organizations filed a claim of appeal in the circuit court. (*Id.* at p 2.) On December 15, 2014, AK Steel filed a motion to dismiss for lack of jurisdiction, asserting the appeal was untimely. AK Steel argued that MCL 324.5506(14), which gives parties 90 days to file an appeal, is not applicable because it governs challenges to "operating permits" rather than permits to install.[1] (Motion to Dismiss, pp 4-5.) AK Steel maintained that because Part 55 of the NREPA did not provide a procedure for SDEIA to appeal the permit to install, the appeal needed to be filed pursuant to Section 631 of the Revised Judicature Act, MCL 600.631, which provides for an appeal from an agency decision when an appeal is not otherwise authorized by law. (*Id.* at pp 6-7.) AK Steel further maintained that MCR 7.123 (a catch-all provision for appeals from agencies not governed by another court rule) applied to the appeal and that,

[1] Operating permits consolidate all of the permits to install for a facility into one permitting document. MCL 324.5506.

pursuant to MCR 7.123(B)(1), SDEIA was required to file its appeal within 21 days after DEQ issued the permit to install. (*Id.*) DEQ did not take a position on AK Steel's motion to dismiss.

On February 25, 2015, the circuit court denied AK Steel's motion to dismiss. (Ex 3.) It concluded that SDEIA had 90 days to file its claim of appeal pursuant to MCL 324.5506(14). (Ex 4, pp 31-33.) On August 27, 2015, the Court of Appeals granted AK Steel's motion for leave to appeal. (Ex 5.)

In its decision of July 12, 2016, the Court of Appeals agreed with AK Steel in part and ruled the 90-day period in MCL 324.5506(14) did not govern SDEIA's appeal to the circuit court because it applied to operating permits, not permits to install. But rather than dismissing the case as untimely, the Court of Appeals (relying on an argument none of the parties had presented) determined the relevant time requirements are contained in MCR 7.119(B)(1), under which SDEIA had 60 days to file its appeal.

MCR 7.119 "governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq.* [i.e., the Administrative Procedures Act] applies." MCR 7.119(A). The Court of Appeals determined the APA applies to DEQ's permitting decision based on its interpretation of Section 91(1) of the APA. (Ex 2, p 7.) Section 91(1) states the APA's provisions "governing a contested case apply" when "licensing is required to be preceded by *notice and an opportunity for hearing*." MCL 24.291(1) (emphasis added). The Court of Appeals noted that DEQ provided notice of a "public comment period" for a draft version of the permit and a "public

hearing" at which people could provide their comments in person. (*Id.* at n 3.) In light of the notice and opportunity for a public hearing, the Court of Appeals reasoned "[t]hus, according to MCL 24.291(1), the provisions of the APA that relate to a contested case, i.e., Chapter 4 of the APA, apply." (*Id.* at p 7.)

In other words, the Court of Appeals interpreted "hearing" in MCL 24.291(1) to mean a public hearing rather than an evidentiary hearing. According to the Court of Appeals' reading of MCL 24.291(1), the contested-case procedures for evidentiary hearings in the APA (including procedures for witnesses and exhibits to be presented before an administrative law judge) apply to an agency's licensing decision whenever that decision is required to be preceded by notice and an opportunity for a public hearing. (*Id.* at 7 and n 3) ("the provisions of the APA that relate to a contested case, i.e. Chapter 4 of the APA, apply" to DEQ's licensing decision given the "notice . . . of the public comment period" and "the public hearing" before the agency issued the permit.). And, based on its conclusion that the APA's contested case provisions apply to DEQ's permitting decision because DEQ held a public hearing, the Court of Appeals ruled that MCR 7.119 governs SDEIA's appeal to the circuit court.

DEQ and AK Steel filed motions for reconsideration on August 2, 2016. DEQ explained that the Court of Appeals misinterpreted "hearing" in MCL 24.291(1) to mean a public hearing rather than an evidentiary hearing, and that, unless the Court of Appeals corrected its error, many licensing decisions for which no contested case is provided by law would be subject to resource-intensive contested cases

simply because an agency's licensing decision was required to be preceded by notice and an opportunity for a public hearing. (DEQ Motion for Reconsideration, pp 5-10.) DEQ also explained that, because no contested case occurred, SDEIA's appeal to the circuit court is governed by MCR 7.123, not MCR 7.119. (*Id.* at pp 8-9.)

The Court of Appeals denied AK Steel's motion for reconsideration on August 24, 2016. (Ex 6.) It denied DEQ's motion for reconsideration on September 21, 2016. (Ex 1.)

STANDARD OF REVIEW

This case presents a question of statutory interpretation regarding the word "hearing" in Section 91(1) of the Administrative Procedures Act, MCL 24.291(1). It also presents a question of the interpretation of MCR 7.119(A). Matters of statutory interpretation are questions of law that this Court reviews de novo. *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490 (2003). The interpretation of a court rule is also reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495 (2009).

A court's "fundamental obligation when interpreting statutes is 'to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.'" *Page v City of Sterling Heights*, 476 Mich 495, 504 (2006) (quoting *Koontz v Ameritech Services, Inc*, 466 Mich 304, 645 (2002)). Unless a term is statutorily defined, it is to be given its plain meaning while also "taking into the context in which" it is used in the statute as a whole. *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Mich*, 492 Mich 503, 515 (2012). "'A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory

scheme.'" *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370 (2014) (quoting *SMK LLC v Dep't of Treasury*, 298 Mich App 302, 309 (2012)). The principles of statutory interpretation also apply to the interpretation of court rules. *Henry*, 484 Mich at 495.

ARGUMENT

I. The word "hearing" in MCL 24.291(1) means an evidentiary hearing, not a public hearing, and the APA's contested case provisions do not apply to an agency licensing decision when the party seeking to challenge the decision does not have a right to a contested case.

The word "hearing" is not defined in the Administrative Procedures Act. But the context in which it is used in MCL 24.291(1) demonstrates that it means an evidentiary hearing, not a public hearing as the Court of Appeals mistakenly concluded.

MCL 24.291(1) states: "When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply." Both the definition of "contested case" and the provisions of the APA governing contested cases establish that the word "hearing" in MCL 24.291(1) means an evidentiary hearing.

A "contested case" is defined as "a proceeding . . . including licensing . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an *evidentiary* hearing." MCL 24.203(3) (emphasis added). In addition, the APA's provisions for a contested case include the following procedures: (1) "the rules of evidence as

applied in a nonjury civil case in circuit court shall be followed as far as practicable" in a contested case, MCL 24.275; (2) "[e]vidence . . . including records and documents . . . shall be offered and made part of the record," MCL 24.276; (3) witnesses may be presented and cross-examined, MCL 24.274; and (4) there shall be a "presiding officer" (i.e., an administrative law judge) in contested cases, MCL 24.279, who has the power to administer oaths, provide for the taking of depositions, and award costs and fees. MCL 24.280.

By contrast, public hearings are very different from the trial-like character of evidentiary hearings. For example, when an agency proposes to promulgate an administrative rule, the APA requires that the agency "give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments." MCL 24.241(1). Witnesses are not examined under oath, and there is no administrative law judge. Indeed, the APA expressly states that "[t]he public hearing shall comply with any applicable statute, but is not subject to the provisions governing a contested case." MCL 24.241(4).

When these provisions of the APA are read together, it is clear that "hearing" in MCL 24.291(1) means an evidentiary hearing, not a public hearing. Therefore, under MCL 24.291(1), "the provisions of [the Administrative Procedures Act] governing a contested case apply" when licensing is required to be preceded by notice and an opportunity for an evidentiary hearing. The converse is also true; the APA's contested-case provisions do not apply to agency licensing decisions where licensing is not required to be preceded by notice and an opportunity for an

evidentiary hearing and where the party seeking to challenge the agency's decision does not have a right to a contested case.

In this case, SDEIA did not have a right to a contested case to challenge DEQ's decision to issue the permit to install. Nothing in Part 55 of the NREPA provides an opportunity for an evidentiary hearing when a third party like SDEIA wants to challenge a permit to install for an existing source like AK Steel. *See* MCL 324.5506(14) (providing a right to a contested case only for owners and operators seeking to challenge certain permit decisions for existing sources).

In fact, the Court of Appeals previously determined that Part 55 of the NREPA does not provide for a contested case to challenge a permit to install. In *Wolverine Power Supply Cooperative v DEQ*, 285 Mich App 548 (2009), DEQ had promulgated a rule that added an opportunity for a contested case for persons wanting to challenge permits to install for new and modified facilities that emit significant amounts of air pollutants and are subject to the requirements to prevent the significant deterioration of air quality. The Court of Appeals emphasized that the Legislature authorized contested cases for *operating* permits in MCL 324.5506(14), but that "the contested case procedure is not available for decisions on *permits to install*." *Id.*, 285 Mich App at 565.

Where, as here, the underlying statute does not provide for a contested case, no contested case is available. *Maxwell v DEQ*, 264 Mich App 567, 572 (2004) (contested case not available to challenge denial of after-the-fact application for a wetland permit where statute did not provide for a contested case); *Kelly Downs, Inc*

v Michigan Racing Comm'n, 60 Mich App 539 (1975) (contested case not available where statute governing horse track license applications did not provide for one). Parties seeking to challenge a permitting decision in these circumstances must instead file a claim of appeal in circuit court pursuant to Section 631 of the Revised Judicature Act, MCL 600.631. That is what happened in this case. SDEIA did not seek a contested case; it sought direct judicial review by filing its claim of appeal in the circuit court. (Claim of Appeal, pp 2-4.)

The Court of Appeals erred when it misinterpreted "hearing" in MCL 24.291(1) to mean a public hearing rather than evidentiary hearing. It also erred when it ruled that the contested-case provisions of the APA apply to an agency's licensing decision when the party seeking to challenge that decision has no right to a contested case.

A. Unless corrected, the Court of Appeals' decision will result in state agencies using their limited resources in contested cases that are not available by law.

The Court of Appeals' decision will have a substantial negative impact on state agencies if it is not corrected. Parties will rely on that decision to claim they have a right to a contested case when an agency's licensing decision is preceded by notice and an opportunity for a public hearing, but where the relevant statute does not provide for a contested case. As a result, agencies will be forced to devote significant resources to contested cases where the Legislature has chosen not to authorize them. In addition to the type of air-pollution permit at issue in this case (permits to install, a type DEQ issues many of each year), other examples where

agencies are required to provide notice and a public hearing, but not a contested case, include: permit applications affecting Great Lakes submerged lands, including constructing marinas and dredging bottomland, MCL 324.32514; applications for operating licenses for hazardous waste treatment, storage or disposal facilities, MCL 324.11125(3); and permit applications for tavern and "class C" liquor licenses under the Liquor Control Code, MCL 436.1521.

This Court should grant leave to ensure agencies do not expend their limited resources on contested cases not authorized by the relevant statutes that govern their licensing decisions.

II. SDEIA's appeal to the circuit court is governed by MCR 7.123, not MCR 7.119, because there was no contested case for DEQ's decision to issue the permit to install.

MCR 7.119(A) states: "This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq.* [the Administrative Procedures Act] applies." The provisions of MCR 7.119 make clear that it governs appeals from agency decisions where the contested-case procedures of the APA apply to the agency's decision and a contested case occurred.

For example, MCR 7.119(G) allows a party to file a motion "to allow the taking of additional evidence before the agency[.]" Such a motion is appropriate when the agency has conducted an evidentiary hearing. There is no "taking of additional evidence" when no contested case took place.

MCR 7.119(B) confirms that MCR 7.119 governs appeals from agency decisions after a contested case. MCR 7.119(B) states in relevant part: "If a

rehearing before the agency is timely requested, then the claim of appeal must be filed within 60 days after delivery or mailing of the notice of the agency's decision or order on rehearing, as provided in the statute or constitutional provision authorizing appellate review." MCR 7.119(B). By providing a time within which a claim of appeal must be filed in the circuit court when "rehearing before the agency is timely requested," MCR 7.119 establishes that it governs appeals from agency decisions after a contested case hearing was conducted for which a party may request a rehearing.

When MCR 7.119 is read as whole, it is clear that it governs an appeal to circuit court from an agency decision after a contested case has occurred. In this case, SDEIA did not have a right to a contested case and no contested case took place. The Court of Appeals erred when it determined that MCR 7.119 governs SDEIA's appeal to the circuit court.

Where, as here, there was no contested case before an agency's licensing decision, an aggrieved party's avenue for appeal is Section 631 of the Revised Judicature Act, MCL 600.631. The court rule that governs such appeals is MCR 7.123. That rule "governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter." MCR 7.123(A). Pursuant to MCR 7.123(B), the time requirements for such appeals are governed by MCR 7.104(A). That rule, in turn, states that an appeal to the circuit court must be taken within 21 days after the agency's decision.

This Court should grant leave to ensure the circuit courts apply the correct court rule – MCR 7.123 – to appeals from agency decisions when there was no contested case. SDEIA's appeal to the circuit court was untimely because it is governed by MCR 7.123 but was filed more than 21 days after DEQ's decision to issue the permit to install. (Ex 2, p 2.) SDEIA's appeal should therefore be dismissed.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals made several critical errors that will have broad consequences beyond this case. It misinterpreted "hearing" in MCL 24.291(1) to mean a public hearing rather than an evidentiary hearing and ruled that the contested case provisions of the Administrative Procedures Act apply to an agency licensing decision when the party challenging the decision does not have a right to a contested case. The Court of Appeals then compounded its error by ruling that MCR 7.119 (rather than MCR 7.123) governed this appeal of a licensing decision when there was a public hearing on a draft permit but no contested case. As a result of the Court of Appeals' errors, parties will claim they have a right to a contested case whenever an agency provides an opportunity for a public hearing on a proposed licensing action, even though they have no legal right to a contested case. The decision will require agencies to use their limited resources on contested cases for which there is no authorization. It will also cause the circuit courts to apply the wrong court rule (MCR 7.119) to appeals from agency decisions when there was no contested case.

The Michigan Department of Environmental Quality respectfully requests that this Court grant its application for leave to appeal and reverse that portion of the Court of Appeals' opinion holding that the contested case provisions of the Administrative Procedures Act apply to agency licensing actions that are preceded by notice and an opportunity for a public hearing. (Ex 2, pp 5-7.) In the alternative, DEQ asks this Court to peremptorily reverse that portion of the Court of Appeals' opinion and dismiss the case.

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